Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JOSHUA HOWARD, PAUL DAVID HOWARD,
and JOHN DOUGLAS HOWARD,

Petitioners

v.

COMMONWEALTH OF KENTUCKY,

Respondent

On Petition For Writ Of Certiorari
To The Commonwealth Of Kentucky
Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state trial court violates a defendant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when: (1) the defendant is charged with three counts of bribery of a public official; (2) the defendant's culpability, if any, to one or more of the counts is as an accomplice to the offense based on an underlying conspiracy; (3) the defendant requests a jury instruction on the elements of conspiracy; (4) the trial court denies the defendant's requested instruction; and (5) the defendant is convicted of the charged offense?

2. Whether a state trial court violates a defendant's rights to due process of law, to trial by an impartial jury, to confront the witnesses against him, and to compulsory process for obtaining witnesses in his favor under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when: (1) the trial court schedules three days for the defendant's trial; (2) the prosecution uses all three days to present its case against the defendant; (3) the defendant requests additional time to present his case and the trial court begrudgingly extends the trial by two days; (4) the trial court, with knowledge that defense witnesses are being cut to meet the court's time constraints, denies the defendant's further requests for time to present his case; and (5) the defendant is convicted of the charged offense?

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OPINION BELOW

The Commonwealth of Kentucky Court of Appeals' judgment and opinion in this case was unpublished and is attached in the Appendix hereto as Exhibit A. The orders entered by the Supreme Court of Kentucky summarily denying discretionary review were also unpublished and are attached in the Appendix hereto as Exhibits B and C.

JURISDICTION

The Commonwealth of Kentucky Court of Appeals entered an opinion affirming the Petitioners' convictions on May 28, 2004. The Supreme Court of Kentucky denied the Petitioners' motion for discretionary review on April 18, 2005. This petition is timely filed pursuant to United States Supreme Court Rule 13, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved herein are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

> of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 2.

STATEMENT OF THE CASE

A. Statement of Facts

The events underlying this case began in October of 2000. At that time, the petitioner, Joshua Howard, was a college student at Eastern Kentucky University in Richmond, Kentucky, and he decided to invest in and open a nightclub in an effort to earn money while in school. Prior to opening the club, Joshua, his father, Joe Howard, and another relative, petitioner Paul Howard, met with an Alcoholic Beverage Control officer, Ed Robinson, to get information as to the procedures for obtaining a liquor license and the requirements of operating a bar in Kentucky. The club, named Club South, opened for business on January 9, 2001.

On January 25, 2001, Robinson visited Club South along with other ABC officers and asked to see the ABC license for the establishment. Robinson would later testify that while the officers found what they believed to be underage drinking, no citations were issued on this first visit. On February 8, 2001, Robinson again visited Club South with other ABC officers, including an officer named Phillip Woodall. During this second visit, the ABC officers cited several individuals for underage drinking, and cited Club South for providing alcohol to those individuals. It is undisputed that Joshua and Robinson spoke on the telephone the following day, February 9, 2001, however, the parties disagree as to the substance of that conversation. Joshua testified that Robinson told him that he could "buy back" the days the club would have to shut down for the citations, and that he got the impression Robinson was looking for a payoff in relation to the citations. Robinson, on the other hand, testified that Joshua made statements tending to indicate a willingness to "take care of" officer Robinson, and that he ultimately concluded that Joshua was offering to, or at least was willing to, bribe Robinson for favorable treatment.

On February 17, 2001, Robinson again visited Club South. During this visit, the parties set up a meeting for February 22, 2001 to be held at a local Shoney's restaurant. Although it was originally planned that Joshua's father would attend the Shoney's meeting, he could not make it because of work, and instead, Joshua's uncle, petitioner John Douglas Howard ("Doug"), accompanied Joshua to the meeting. At the Shoney's meeting, Robinson wore a concealed tape and transmitter, and the tapes of this meeting were played during the trial. The tapes reveal that both the Howards and Robinson made ambiguous statements tending to reinforce the respective initial impressions formed by Joshua and Robinson. For example, Robinson stated that Club South could be closed if they received another citation, and Doug responded to the effect that they were prepared to help Robinson out if he wanted to do that.

On March 1, 2001, Robinson and Woodall again visited Club South. It is undisputed that Robinson was wearing a "wire" during this visit and that Woodall was not equipped with any recording device. Oddly enough, only Woodall met privately with Joshua in the back of the club, and Joshua would later testify that Woodall made threats during this meeting that Joshua would be arrested and jailed relating to the citations if he did not pay up. A meeting was scheduled for March 5, 2001, at which Joshua, Paul, Doug, and Jeremy Howard met Robinson and Woodall at a local Bob Evans' restaurant. The meeting on March 5, 2001 was recorded by audio and video surveillance, and Robinson made the first reference to money during this meeting. Additionally, Robinson stated that Woodall had initially wanted $2,000.00, but that they had finally agreed on $1,000.00. It is undisputed that $1,000.00 was given to Robinson by Doug during this meeting. Two subsequent meetings occurred on April 11, 2001 and May 10, 2001, during which Joshua, meeting alone with Woodall, transferred two additional payments of $1,000.00. Joshua testified that these payments

were made because Robinson and Woodall had stated that they wanted the payments on a monthly basis.

At the May 10, 2001 meeting, Woodall told Josh Howard that a meeting had been arranged at a Reno's restaurant in Prestonsburg, Kentucky, at which time Paul and Doug could talk to an ABC official who might be able to help with the administrative charges against Club South. Paul and Doug were observed arriving at the Reno's, however, the planned meeting never took place. The petitioners were subsequently charged with three counts of Bribery of a Public Servant.

B. Procedural History

On July 16, 2001, the Grand Jury in Fayette County, Kentucky returned a three count indictment charging that the petitioners, Joshua Howard, Paul David Howard, and John D. Howard, AKA Doug Howard, committed the offense of bribery of a public servant on three separate occasions. KY. REV. STAT. ANN. § 521.020 (Michie 1999).[1] The petitioners were tried by jury beginning on August 13, 2002, and it was during the trial when the petitioners first raised the objections advanced herein.

The petitioners' objection to the jury instructions came during a bench conference following the presentation of evidence, with counsel objecting to the language used in the instructions on bribery, and with counsel reading from and requesting an instruction on conspiracy similar to the pattern jury instructions for the United States Court of Appeals for the Sixth Circuit.[2] The petitioners first raised the

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[1] Count 1 of the indictment also charged Jeremy Howard with Bribery of a Public Servant pursuant to an agreement or conspiracy. He was tried along with the petitioners named herein but has not appealed the judgment and is thus not a party to this Petition.

[2] Specifically, counsels for the petitioners objected that the jury instruction language was confusing in that it stated that the defendant could be found guilty if the jury believed "[t]hat the Defendant had an agreement with Paul David Howard, *and/or* John D. Howard . . ."

constitutional question relating to the instructions in their Motion for Discretionary Review to the Kentucky Supreme Court, in which the petitioners cited the Fifth and Fourteenth Amendments to the United States Constitution, as well as *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the principle that a jury must find all elements of an offense proven beyond a reasonable doubt.

The petitioners also repeatedly objected to the time constraints on their defense during the trial and affirmatively stated to the trial judge that witnesses were being cut to accommodate the court's limitations. Further, the petitioners made an objection to the trial court in which counsel for petitioners stated that the right to present a defense should not be jeopardized because of time constraints and that it was fundamentally unfair to allow the prosecution three days to put on its case while only allowing mere hours for the defense. The petitioners reiterated the constitutional question relating to the time limitations on their defense in their appeal to the Commonwealth of Kentucky Court of Appeals, in which the petitioners cited the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution. The petitioners repeated the constitutional arguments advanced in the trial court and the Court of Appeals in their Motion for Discretionary Review to the Supreme Court of Kentucky.

The jury ultimately returned a verdict of guilty for each defendant on all three counts. The jury recommended a total of five years imprisonment for Joshua Howard and fifteen years imprisonment for Paul and Doug Howard. On September 18, 2002, the Fayette Circuit Court entered final judgment placing Joshua Howard on probation for five years.

(emphasis added), and counsels argued that the instruction should be similar to the pattern jury instructions for conspiracy and merely recite the requirement of an agreement. The Commonwealth has argued that this issue is not preserved, however, the argument before the trial court adequately put the court on notice of objection to the instructions, and therefore, any objection to preservation is without merit.

Paul and Doug Howard were each sentenced to ten years in prison.

A timely notice of appeal was filed, and on May 28, 2004, the Commonwealth of Kentucky Court of Appeals rendered an opinion affirming the petitioner's convictions. The petitioners moved for discretionary review in the Supreme Court of Kentucky, which was denied by order as to all three petitioners on April 18, 2005. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

First, the trial court's denial of the petitioners' requested instruction on conspiracy, and the decision by the Commonwealth of Kentucky Court of Appeals affirming the trial court's ruling were contrary to precedent of this Court interpreting the United States Constitution. Second, the trial court's denial of the petitioners' requests for additional time to present their defense and the decision by the Commonwealth of Kentucky Court of Appeals affirming the trial court's rulings involve an important issue of United States Constitutional law that has not been settled by this Court.

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF THE PETITIONERS' REQUESTED INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT AND THUS VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW

The United States Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. A

fundamental component of this protection is "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Additionally, this Court has unanimously applied the principle, embodied in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, that "the criminal defendant [has] the right to demand that a jury find him guilty of all the elements of the crime with which he is charged . . . ." *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

In *Gaudin*, this Court found that it was unconstitutional for the trial judge to refuse to submit to the jury the question of whether a statement was material within the meaning of 18 U.S.C. § 1001. Likewise, in the present case it was unconstitutional for the trial court to refuse to submit the question to the jury of whether the defendants had participated in a conspiracy to commit the charged offenses. Specifically, the failure of the trial court to properly instruct on conspiracy had the effect of removing, or at the very least diminishing, the prosecution's burden of establishing the requisite *mens rea* of accomplice liability based on an underlying conspiracy.

In the present case, the Grand Jury specifically charged in the indictment that the petitioners "committed the offense of Bribery of a Public Servant when, *pursuant to an agreement or conspiracy* that they would do so, they offered to convey and did convey a sum of money to Alcoholic Beverage Control Officers Ed Robinson and Phillip Woodall with intent to influence their enforcement of Kentucky ABC laws and regulations . . . ." *See* Indictment attached in the Appendix hereto as Exhibit D (emphasis added). However, Kentucky law does not provide a direct means of establishing culpability by showing an agreement between parties. Instead, culpability based on an agreement can only be established by satisfying the provisions governing a

conspiracy. This principle is illustrated by dissecting the applicable statutes.

Under Kentucky law, bribery of a public servant is a direct actor, or principal defendant, criminal prohibition with a specific intent *mens rea* requirement. *See* KY. REV. STAT. ANN. § 521.020(1)(a) (Michie 1999) ("A person is guilty of bribery of a public servant when: He offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity as a public servant . . . .") However, in the present case, the evidence presented by the prosecution showed that only Doug Howard offered and conferred a pecuniary benefit in the first meeting, and only Joshua Howard offered and conferred such a benefit in the latter two meetings. Therefore, all other culpability in this case had to be established by resort to some other statutory section of culpability.

Kentucky law provides two means by which an accessory could be culpable in this case, by complicity as defined in KY. REV. STAT. ANN. § 502.020 (Michie 1999), or by participation in a conspiracy as defined in KY. REV. STAT. ANN. § 506.040 (Michie 1999). However, the section covering complicity does not include "agreement" as a means of establishing culpability, instead the section provides that a party may be culpable as an accomplice if engaged in a conspiracy. *See* KY. REV. STAT. ANN. § 502.020(1)(a). The section covering conspiracy does include "agreement" as a means of establishing culpability, *see* KY. REV. STAT. ANN. § 506.040, and therefore, the conspiracy section must be overlaid on top of the complicity section in order to find the non-principal actor guilty of each count in this case. In other words, the prosecution had the burden of establishing the elements of the bribery by the principal, and the burden of establishing the elements of both complicity and the underlying conspiracy of any accomplices.

The distinction in separating out each of the culpability sections is important because each section has its own *mens rea* requirement. As already noted above, the principal prohibition of bribery of a public servant requires the prosecution to prove the defendant had the specific intent to influence a public servant. Complicity requires the prosecution to prove that the defendant acted "with the intention of promoting or facilitating the commission of the [bribery of a public servant]." KY. REV. STAT. ANN. § 502.020. However, complicity only attaches culpability for "an offense committed *by another person*" when the prosecution proves that the defendant "engages in a conspiracy *with such other person* to commit the offense . . . ." *Id.* (emphasis added). Conspiracy, on the other hand, is more vague as to the party with whom the defendant agreed, providing that the defendant is culpable so long as he "[a]grees with one (1) or more persons that *at least one (1) of them will engage in conduct constituting that crime . . . .*" KY. REV. STAT. ANN. § 506.040(1)(a) (emphasis added). This is clearly a different standard of culpability than that provided in the statutory section covering complicity, and the failure of the trial court to separately instruct on the two sections relieved the prosecution of establishing the higher degree of *mens rea* required in the complicity section.

Because the defendants were convicted of the substantive offense of Bribery of a Public Servant, rather than the separate offense of Conspiracy, these convictions were based on the stacked statutory sections of complicity and conspiracy. The failure of the trial court to properly instruct on each of the statutory sections was erroneous, and pursuant to the Fifth and Fourteenth Amendments to the Constitution, as well as this Court's precedent, such failure was a violation of the petitioners' rights to due process of law.

II. THE TRIAL COURT'S DENIAL OF PETITIONERS' REQUESTS FOR ADDITIONAL TIME TO PRESENT THEIR DEFENSE VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW, TO TRIAL BY AN IMPARTIAL JURY, TO CONFRONT THE WITNESSES AGAINST THEM, AND TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN THEIR FAVOR

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution work in tandem to ensure that a criminal defendant has a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This Court has not held what relation time restrictions have on the rights guaranteed to a criminal defendant to present a defense. However, other courts' decisions lend some guidance to this important issue, and the principles of these decisions demonstrate that the trial court's actions in the present case violated the petitioners' rights to due process of law, trial by jury, confrontation, and compulsory process.

The imposition of time limits is a factor that goes to the fairness of a trial. *Monotype Corp. PLC v. International Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994). While trial courts have discretion to place reasonable limits on the presentation of evidence, courts have disapproved of rigid hour limits on trials. *Id.* at 450-51. Generally, a trial court "must not adhere so rigidly to time limits as to sacrifice justice in the name of efficiency." *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995). Any time limits imposed should not be absolute, but instead "should be sufficiently flexible to accommodate adjustment if it appears during trial that the court's initial assessment was too restrictive." *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081,

1171 (7th Cir. 1982). Additionally, a court "should impose time limits only when necessary . . . [a]nd, the court must ensure that it allocates trial time evenhandedly." *Duquesne Light Co. v. Westinghouse Electric Corp.*, 66 F.3d 604, 610 (3d Cir. 1995). Finally, "[t]he circumstances of each individual case must be weighed by the trial judge . . . [and the] presentation of a competent defense may require more time than presentation of a plaintiff's case-in-chief." *Id.* at 1172.

In the present case, the trial court originally set the length of trial for three days after consultation with the parties. However, the Commonwealth used all three days of the initial time period for its presentation of the evidence against the petitioners. When it became apparent that the Commonwealth was using a substantially greater amount of time to present its case, counsel for petitioners repeatedly requested additional time to present their defense. The petitioners' requests were initially denied, but then were partially accommodated with an additional two days of trial. Counsel again requested additional time when it became obvious that two days would still be too restrictive to present an adequate defense for four defendants. In this later request, counsel for petitioners emphasized that the prosecution was given a full three days to present its case while the defendants were being required to present their case, along with all three closing arguments (the Commonwealth and two counsels for the separate defendants), in only two days. Further, in the final requests counsel for the petitioners even made the trial judge aware of the fact that defense witnesses were being cut to meet the court's time limitations.

In limiting the time available to the petitioners, the trial court made no inquiry into the substance of the witnesses' testimony to determine if the evidence was cumulative, confusing, or prejudicial. *See, e.g., Secretary of Labor v. DeSisto*, 929 F.2d 789, 796 (1st Cir. 1991) (holding that the trial court abused its discretion in limiting witnesses without determining if the evidence was cumulative and stating "[t]he

appropriate remedy is a new trial."). And more importantly, the trial court put no limitations on the presentation of evidence by the Commonwealth – instead the court allowed the prosecution to use all three days originally allotted for trial – while limiting four defendants to approximately half the time given to the Commonwealth. *See, e.g., Sparshott v. Feld Entertainment, Inc.*, 311 F.3d 425, 433-34 (D.C. Cir. 2002) (holding that the trial court abused its discretion in failing to give "equal" time to a defendant).

The failure of the trial court to follow established procedures to evaluate the proffered evidence, as well as to gauge the effect the time limitations might have on the petitioners' defense was an abuse of discretion. Additionally, the trial court abused its discretion by only applying the time restrictions to the presentation of the petitioners' defense. The trial court's restrictions severely limited the petitioners ability to put on a complete defense, and thus, the refusal to grant additional time to the petitioners violated their rights to a fair trial embodied in the principles of due process of law, trial by jury, confrontation, and compulsory process.

CONCLUSION

For all of the foregoing reasons, whether considered separately or in conjunction, the petitioners, Joshua Howard, Paul David Howard, and John Douglas Howard, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Commonwealth of Kentucky Court of Appeals rendered on May 28, 2004, as made final by the subsequent denial of the petitioners' motion for discretionary review entered by the Supreme Court of Kentucky on April 18, 2005.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF KENTUCKY COURT OF APPEALS' OPINION	A
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[3] Only those Instructions on which John Douglas Howard's convictions were based are included for the purposes of this petition.

[4] Only those Instructions on which Paul David Howard's convictions were based are included for the purposes of this petition.

RENDERED: MAY 28, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001960-MR

JOSHUA HOWARD; PAUL DAVID HOWARD
and JOHN DOUGLAS HOWARD APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
V. HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-00737-01

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

EMBERTON, CHIEF JUDGE. Joshua Howard, Paul David Howard and John D. (Doug) Howard were convicted on three counts of bribery of a public official. They appeal alleging that: (1) the trial court improperly limited time to present

their defense; (2) a prosecution witness provided false testimony to the jury; (3) the jury instruction on conspiracy did not require the jury to find all elements beyond a reasonable doubt; (4) the trial court erred when it permitted the Commonwealth to define legal terms to the jury; (5) racial remarks made by them on tapes introduced by the Commonwealth should have been deleted; and (6) the trial court erroneously denied their motions for directed verdicts. We affirm.

In October 2000, Josh Howard, a student at Eastern Kentucky University, opened a bar called Club South in Richmond, Kentucky. In preparation for the opening he met with Ed Robinson, an Alcohol Beverage Control officer, and after obtaining the necessary documents, the club opened in January 2001.

On February 8, 2001, Robinson and five other ABC officers, including Phillip Woodall and Steve Payton, Robinson's supervisor, made an official visit to the club. Several patrons were cited, as well as Club South for underage drinking. Josh testified that on that evening he and Robinson met in a back room of the club where Robinson instructed Josh to call him the following day. Josh complied. Although Josh denies he suggested a payoff arrangement, Robinson testified that during the Conversation he became suspicious and informed Woodall and Payton of his suspicions.

On February 17, 2001, Robinson and Woodall returned to Club South and arranged a meeting to be held on February 22, 2001. A detective with the Kentucky State Police arranged for video and audio recordings of the meeting. At the meeting, attended by Robinson, Woodall, Josh, and Doug Howard, no money exchanged hands, but Doug told Robinson that the Howards were prepared to help Robinson. Josh testified that he left the meeting believing that Robinson was seeking a bribe.

A subsequent meeting was held on March 5, 2001. Josh, Jeremy Howard, Paul David, Doug, Robinson and Woodall

attended and there is no dispute that at that meeting Doug gave Robinson $1,000.[1] At two subsequent meetings, one on April 11, 2001, and on May 10, 2001, $1,000 payments were again made to Robinson.

It is the Howards' initial contention that the trial court deprived them of the right to be heard under Section 11 of the Kentucky Constitution and the Fifth, Sixth, and Seventh Amendments to the United States Constitution. Every litigant is entitled to the time and opportunity to present his case. "This is most emphatically true in the trial of criminal prosecutions."[2] However, the trial court has the authority to control the length of a trial, and absent a showing of actual prejudice, no reversible error will be found. As stated in Lewis v. Commonwealth:[3]

> Appellant cites no instance where these alleged "Draconian time constraints" affected his ability to present his defense. He does not claim that the trial judge cut short his examination or cross-examination of any witness or otherwise precluded him from presenting evidence. It is axiomatic that a trial judge has wide latitude in controlling the length of a trial, and, absent some showing of prejudice, no abuse of discretion will be found. (Citations omitted.)

Pretrial, counsel for the Howards and the Commonwealth conferred with the trial court and it was agreed that three days would be scheduled for trial. However, at the end of the first day, when it became apparent that three days would be insufficient, defense counsel suggested that a fourth day,

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[1] Jeremy Howard is not a party on appeal.

[2] Chenault v. Commonwealth, 282 Ky. 453, 138 S.W.2d 969, 972 (1940).

[3] Ky., 42 S.W.3d 605, 613 (2001).

Monday, August 19, 2002, be added. The trial court stated that the jurors had already been excused for that day. However, when the trial reconvened on the second day, the trial judge informed the parties that the jury would be available on Monday to hear closing arguments, but that she would have to leave by 3:30 p.m. At the close of the third day of trial defense counsel stated that the defense would take five or six hours. Again concerned that four days of trial could be insufficient, the court added a fifth day, Tuesday, August 20, 2002, with closing arguments to be conducted on that date.

On Monday, August 19, 2002, the court, knowing the time constraints, expressed concern over the Commonwealth's request for a recess. Defense counsel made no objection and expressed that it had voluntarily decided not to call some witnesses. Later in the same day, after defense counsel advised that they wanted to present witnesses the following morning, the trial court reminded counsel that two extra days had already been allotted for the trial. The discussion concluded and the trial resumed. After counsel for Joshua and Jeremy advised that no more witnesses would be presented, counsel for Paul David and Doug Howard expressed concern over the imposed time limits, stating they needed sufficient time for their expert to testify by deposition. The court permitted the testimony of the expert and no further objection was made regarding the time limitation.

Although the Howards now complain that even with the two day time extension they were unconstitutionally denied the right to present their case. There is no suggestion as to which, if any, witnesses were not called because of the time limitation or what their testimony might have been. Absent a showing of prejudice, this court will not reverse the trial court's decision to control the length of a trial.[4]

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[4] Id.

The Howards next complain about alleged "false" testimony given by Robinson. In his closing argument the prosecutor argued that it was not Robinson's fault that not all conversations with Josh were recorded, but that Robinson's supervisor, Payton, should have told him to record the conversations. Subsequently, Payton approached the prosecutor and informed him that he had, in fact, told Robinson to record all conversations. The prosecutor then advised the court of the conversation and expressed his concern that his closing argument may have contained inaccurate statements of fact. Defense counsel, the prosecution, and the trial court engaged in a bench conference and it was decided that the parties could review Payton's testimony to discover any inconsistencies in the facts and the prosecutor's closing argument. After the tape was reviewed, the parties returned to the courtroom and the bench conference resumed. Defense counsel made no objection and rejected the opportunity to move for a mistrial indicating there might later be an objection after reviewing the entirety of Robinson's testimony.[5] There was no motion for a new trial. We cannot construe the discussion that occurred at the bench, after which all defense counsel agreed to allow the jury to continue deliberations.

The Howards also failed to properly preserve the alleged error that the jury instruction failed to include all elements of conspiracy. The only objection made to the instruction was that it was confusing and unnecessary to list each accused under the bribery instructions. That issue is not raised on appeal. Having review the instructions in search of palpable error, we find nothing so unfair or prejudicial that warrants this court disturbing the jury's verdict.[6]

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[5] This procedure is questionable since, if defense counsel were to raise any objection post-trial, it would have had to have been raised during the trial.

[6] Kentucky Rules of Criminal Procedure (RCr) 10.26.

We have reviewed the prosecution's closing argument including the discussion distinguishing between the defense of extortion, coercion, and entrapment. The trial court denied the Howards' objection to the prosecutor's attempt to further explain the court's instructions, stating that the Commonwealth was well within the proper scope of closing argument. We agree. The prosecutor is given wide latitude in presenting closing argument to the jury. A prosecutor may comment on defense strategy by providing his interpretation of the evidence and its application to the court's instructions.[7] We can find nothing in the closing argument that requires reversal.

The surveillance tape recorded on March 5, 2001, contained racially offensive remarks made by Joshua. Pretrial, the prosecutor agreed to redact the remarks complained of by defense counsel, and during the trial, the court admonished the jury that the sound would be turned off during a portion of the tape. After the jury began to deliberate, however, defense counsel advised the court that in addition to the redacted portion, when the tape was played to the jury there was another racially offensive remark. Defense counsel explained that no objection was made when the tape was played for fear of drawing attention to the offensive remark. All parties agreed that if the jury asked to listen to that particular tape again, the additional comment would be redacted; the jury, however, never again requested the tape. There is no evidence that the Commonwealth intentionally withheld the existence of the additional racial comment or that defense counsel, who had access to the tapes through discovery, could not have discovered it and made the necessary objection. The alleged error is not properly preserved and we find no reason to review the error under RCr[8] 10.26.

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[7] Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 125 (2001).

[8] Kentucky Rules of Criminal Procedure.

Finally, the Howards' contention that their motions for directed verdict of acquittal should have been granted because they were entrapped is without merit. "In ruling on a directed verdict motion, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth's evidence is true, leaving questions of weight and credibility to the jury."[9] We find no error.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:
R. Burl McCoy
John Kevin West
Tonya S. Rager
MCCOY, WEST, FRANKLIN & BEAL
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANTS:
John Kevin West
MCCOY, WEST, FRANKLIN & BEAL

BRIEF FOR APPELLEE:
Albert B. Chandler III
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:
Samuel J. Floyd, Jr.
Frankfort, Kentucky

---

[9] Slaughter v. Commonwealth, Ky. App., 45 S.W.3d 873, 875 (2000).

Supreme Court of Kentucky

2004-SC-0497-D
(2002-CA-1960)

JOSHUA HOWARD
PAUL DAVID HOWARD
and JOHN DOUGLAS HOWARD MOVANTS

V. FAYETTE CIRCUIT COURT
NOS. 2001-CR-0737-001

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED April 13, 2005

s/ Joseph E. Lambert
Chief Justice

Supreme Court of Kentucky

2004-SC-0497-D
(2002-CA-1960)

JOSHUA HOWARD
PAUL DAVID HOWARD
and JOHN DOUGLAS HOWARD MOVANTS

FAYETTE CIRCUIT COURT
V. NOS. 2001-CR-0737-001, 2001-CR-0737-002
& 2001-CR-0737-003

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER CORRECTING
ORDER DENYING DISCRETIONARY REVIEW

The order denying discretionary review entered April 13, 2005, is hereby corrected to reflect the addition of Fayette Circuit Court Nos. 2001-CR-0737-002 and 2001-CR-0737-003.

ENTERED April 18, 2005

s/ Joseph E. Lambert
Chief Justice

C

FAYETTE CIRCUIT COURT INDICTMENT NO. 01-CR- 737
CRIMINAL BRANCH JULY, 2001
3rd DIVISION

THE COMMONWEALTH OF KENTUCKY

VS.

JOSHUA HOWARD
PAUL DAVID HOWARD
JOHN D. HOWARD, AKA DOUG HOWARD
JEREMY HOWARD, DEFENDANTS

COUNTS 1-3: BRIBERY OF A PUBLIC SERVANT
KRS 521.020 UOR 51200
CLASS C FELONY

THE GRAND JURY CHARGES:

Count 1: On or about the 5th day of March, 2001, in Fayette County, Kentucky, the above named Defendants committed the offense of Bribery of a Public Servant when, pursuant to an agreement or conspiracy that they would do so, they offered to convey and did convey a sum of money to Alcoholic Beverage Control Officers Ed Robinson and Phillip Woodall with intent to influence their enforcement of Kentucky ABC laws and regulations at the Club South bar in Madison County, Kentucky;

Count 2: On or about the 11th day of April, 2001, in Fayette County, Kentucky, the Defendants Joshua Howard, Paul David Howard and John D. Howard committed the offense of Bribery of a Public Servant when, pursuant to an

agreement or conspiracy that they would do so, the Defendant Joshua Howard offered to convey and did convey a sum of money to Alcoholic Beverage Control Officer Phillip Woodall with intent to influence Officer Woodall and Officer Ed Robinson in their enforcement of Kentucky ABC laws and regulations at the Club South bar in Madison County, Kentucky;

Count 3: On or about the 10th day of May, 2001, in Fayette County, Kentucky, the Defendants Joshua Howard, Paul David Howard and John D. Howard committed the offense of Bribery of a Public Servant when, pursuant to an agreement or conspiracy that they would do so, the Defendant Joshua Howard offered to convey and did convey a sum of money to Alcoholic Beverage Control Officer Phillip Woodall with intent to influence Officer Woodall and Officer Ed Robinson in their enforcement of Kentucky ABC laws and regulations at the Club South bar in Madison County, Kentucky;

Against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

s/ _____
FOREPERSON

A TRUE BILL

Presented by the Foreperson of the Grand Jury of the Court, in the presence of the Grand Jury, and received from the Court by me and filed in open Court this 16th day of July, 2001.

s/ Wilma F. Lynch, Clerk, Fayette Circuit Court

Bail $ 5,000 F/C each count
Arraignment is set for the 27th day of July, 2001 at 8:30 a.m..

Grand Jury Witnesses: Det. Jasper White

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS. **JURY INSTRUCTIONS** **01-CR-737-001**

JOSHUA HOWARD **DEFENDANT**

****

Immediately upon retiring to the jury room you should elect one of your number as Foreperson.

INSTRUCTION NO. 1

PRESUMPTION OF INNOCENCE

The law presumes a defendant to be innocent of a crime, and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that the Defendant is guilty. If upon the whole case, you have a reasonable doubt that the Defendant is guilty, you shall find him not guilty.

INSTRUCTION NO. 2

Count 1

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 5th day of March, 2001 and before the finding of the Indictment herein, John D. Howard, AKA Doug Howard offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Paul David Howard, and/or John D. Howard AKA Doug Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

INSTRUCTION NO. 3

Count 1

CRIMINAL FACILITATION OF BRIBERY OF A PUBLIC SERVANT

If you do not find the Defendant guilty under Instruction No. 2, you will find the Defendant guilty of Criminal Facilitation of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 5th day of March, 2001 and before the finding of the Indictment herein, the Defendant had knowledge that another person was committing or intended to commit the offense of Bribery of a Public Servant;

AND

B. That the Defendant engaged in conduct which knowingly provided that person with means or opportunity for the commission of the offense of Bribery of a Public Servant;

AND

C. That such means or opportunity did, in fact, aid that person in the commission of the offense of Bribery of a Public Servant;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officers Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

INSTRUCTION NO. 4

Count 2

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 11th day of April, 2001 and before the finding of the Indictment herein, he offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Paul David Howard, and/or John D. Howard AKA Doug Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

INSTRUCTION NO. 5

Count 3

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 10th day of May, 2001 and before the finding of the Indictment herein, he offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

C. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

INSTRUCTION NO. 6

ENTRAPMENT

Even though the Defendant might otherwise be guilty of Bribery of a Public Servant under Instructions No. 2, 3, 4, and 5, you shall not find the Defendant guilty under those Instructions if you believe from the evidence all of the following:

A. Either Officer(s) Ed Robinson and/or Phillip Woodall or another person acting in cooperation with Officer(s) Ed Robinson and/or Phillip Woodall induced or encouraged the Defendant to commit any of the acts mentioned in Instructions No. 2, 3, 4, and 5;

B. That Officer(s) Ed Robinson and/or Phillip Woodall or another person acting in cooperation with them was seeking thereby to obtain evidence against the Defendant for the purpose of criminal prosecution;

AND

C. At the time of such inducement or encouragement, the Defendant was not otherwise disposed to engage in such conduct.

INSTRUCTION NO. 7

DEFINITIONS

"Intentionally" – A person acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.

"Public servant" – Means:
(a) Any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state; or
(b) Any person exercising the functions of any such public officer or employee; or
(c) Any person participating as adviser, consultant or otherwise in performing a governmental function, but not including witnesses; or
(d) Any person elected, appointed or designated to become a public servant although not yet occupying that position.

INSTRUCTION NO. 8

UNANIMOUS VERDICT

The verdict of the jury must be unanimous and must be signed by one of you as Foreperson. You may use the form provided below in writing your verdict.

AS TO COUNT 1:

(A) We, the jury, find the Defendant NOT GUILTY of Bribery of a Public Servant.

_____
FOREPERSON

OR

(B) We, the jury, find the Defendant GUILTY of Bribery of a Public Servant under Instruction No. 2.

s/ Roxanna Walker
FOREPERSON

OR

(C) We, the jury, find the Defendant GUILTY of Criminal Facilitation of Bribery of a Public Servant under Instruction No. 3.

_____
FOREPERSON

OR

(D) We, the jury, find the Defendant NOT GUILTY of Bribery of a Public Servant under Instruction No. 6.

_____
FOREPERSON

AS TO COUNT 2:

(A) We, the jury, find the Defendant NOT GUILTY of Bribery of a Public Servant.

_____
FOREPERSON

OR

(B) We, the jury, find the Defendant GUILTY of Bribery of a Public Servant under Instruction No. 4.

s/ Roxanna Walker_____
FOREPERSON

OR

(C) We, the jury, find the Defendant NOT GUILTY of Bribery of a Public Servant under Instruction No. 6.

_____
FOREPERSON

AS TO COUNT 3:

(A) We, the jury, find the Defendant NOT GUILTY of Bribery of a Public Servant.

_____
FOREPERSON

OR

(B) We, the jury, find the Defendant GUILTY of Bribery of a Public Servant under Instruction No. 5.

s/ Roxanna Walker_____
FOREPERSON

OR

(C) We, the jury, find the Defendant NOT GUILTY of Bribery of a Public Servant under Instruction No. 6.

_____

FOREPERSON

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS. **JURY INSTRUCTIONS** **01-CR-737-001**

JOHN D. HOWARD **DEFENDANT**
AKA DOUG HOWARD

****

Immediately upon retiring to the jury room you should elect one of your number as Foreperson.

INSTRUCTION NO. 1

PRESUMPTION OF INNOCENCE

The law presumes a defendant to be innocent of a crime, and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that the Defendant is guilty. If upon the whole case, you have a reasonable doubt that the Defendant is guilty, you shall find him not guilty.

INSTRUCTION NO. 2

Count 1

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 5th day of March, 2001 and before the finding of the Indictment herein, the Defendant offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Joshua Howard, and/or Paul David Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

INSTRUCTION NO. 4

Count 2

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 11th day of April, 2001 and before the finding of the Indictment herein, Joshua Howard offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Joshua Howard, and/or Paul David Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

INSTRUCTION NO. 6

Count 3

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 10th day of May, 2001 and before the finding of the Indictment herein, Joshua Howard offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Joshua Howard, and/or Paul David Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS. **JURY INSTRUCTIONS** **01-CR-737-001**

PAUL DAVID HOWARD **DEFENDANT**

****

Immediately upon retiring to the jury room you should elect one of your number as Foreperson.

INSTRUCTION NO. 1

PRESUMPTION OF INNOCENCE

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A. That in this county on or about the 5th day of March, 2001 and before the finding of the Indictment herein, John D. Howard, AKA Doug Howard offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Joshua Howard, and/or John D. Howard AKA Doug Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

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Count 2

BRIBERY OF A PUBLIC SERVANT

You will find the Defendant guilty of Bribery of a Public Servant under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 11th day of April, 2001 and before the finding of the Indictment herein, Joshua Howard offered and did give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

B. That the Defendant had an agreement with Joshua Howard, and/or John D. Howard AKA Doug Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

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AND

B. That the Defendant had an agreement with Joshua Howard, and/or John D. Howard AKA Doug Howard, and/or Jeremy Howard to offer or give a sum of money to Officer(s) Ed Robinson and/or Phillip Woodall;

AND

C. That in so doing, the Defendant intended to influence Officer(s) Ed Robinson and/or Phillip Woodall's judgment as Alcohol Beverage Control Officers with respect to their enforcement of the Kentucky Alcohol Beverage Control laws and regulations at the Club South bar in Madison County, KY;

AND

D. That the Defendant did not act as a result of coercion or extortion by Officer(s) Ed Robinson and/or Phillip Woodall.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of that offense and return the verdict to the Court without deliberating on the question of punishment.